IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

WILLIAM LAROY DAVIS,
Appellant.

No. 2 CA-CR 2013-0411
Filed October 27, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Cochise County
No. S0200CR201300167
The Honorable John F. Kelliher Jr., Judge

AFFIRMED AS CORRECTED

COUNSEL

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MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

E C K E R S T R O M, Chief Judge:

¶1 Following a jury trial, appellant William Davis was convicted of transportation of methamphetamine for sale, forgery, possession of marijuana, and five counts of possession of drug paraphernalia. The trial court sentenced him to enhanced, concurrent terms of imprisonment, the longest of which is thirty-two years, to be served consecutively to his prison terms in three other cause numbers. After Davis filed his timely notice of appeal from the judgment and sentences, the court issued an "order amending sentencing" on September 24, 2013, that purported to make several of his sentences in this case consecutive to each other. Because this modification of sentences was illegal, as both parties acknowledge, we vacate that portion of the September 24 order and affirm the convictions and sentences originally imposed, as corrected.

Factual and Procedural Background

¶2 On September 5, 2013, Davis was sentenced at a consolidated hearing that included two additional cause numbers, CR201200365 and CR201300166. He had previously been sentenced in a third case, CR201300366. When the trial court initially pronounced the sentence for this case, CR201300167, the court stated the thirty-two-year sentence for transporting methamphetamine would "run consecutively to the sentences in CR201200365, CR201300166, CR201300167 [sic], and . . . CR201200366." The court then stated, inconsistently, that the twelve-year sentence imposed for forgery would be "concurrent to the 32 years" for the transportation count. But any confusion caused by these conflicting pronouncements was promptly dispelled by the court's following explanatory remarks:

> It would be appropriate, I think, legally, to sentence you to consecutive terms with respect to the offenses committed on January 26th [transportation of methamphetamine and forgery] and February 4th [possession of marijuana and drug paraphernalia]. But, again, my sense of mercy dictates I run them concurrent. So all of the sentences in this case, CR201300167 shall be run concurrent to each other, but they shall be consecutive to the other three cases.

¶3 For the remaining class six felony offenses committed in February, the trial court imposed enhanced, 5.75-year presumptive terms, finding there was "no sense in giving" an aggravated sentence because of the thirty-two-year term already imposed for the transportation offense. The court then repeated its intention that "all of the sentences in CR201300167 are running concurrent with each other," but the court again made the same error when reciting case numbers, stating these sentences were to be "consecutive to the 201200365, the 201300166, 201300167 [sic] and 201200366."

¶4 The minute entry from the sentencing hearing reflects that the prison terms imposed in this case were to be served concurrently, insofar as it designates the same starting date for them. *See State v. Young*, 106 Ariz. 589, 591, 480 P.2d 345, 347 (1971) ("It is . . . manifestly impossible for consecutive sentences to both begin on the same date."). However, the minute entry also contains inconsistent and contradictory information about the cause numbers to which the sentences are to be consecutive.

¶5 Davis filed his notice of appeal from the judgment and sentences on September 9, 2013. *See* Ariz. Const. art. II, § 24; A.R.S. § 13-4033(A)(1), (4); Ariz. R. Crim. P. 31.3. Over two weeks later, on September 24, the trial court filed an order "amending sentencing" that made a number of corrections and changes to the sentencing minute entry. On appeal, Davis challenges only the portion of the order that provides: "Counts 3 and 5 of the Indictment are to run

CONCURRENTLY, and Counts 11, 13, 15, 17, 19 and 21 of the Indictment are to run **CONSECUTIVELY** with each other."

Sentences

¶6 As a preliminary matter, we agree with the parties that the record is clear as to what sentences the trial court imposed at the sentencing hearing, even with the irregularities below. When the record contains inconsistencies regarding the sentence imposed, it is the oral pronouncement of sentence that controls the question, *State v. Johnson*, 108 Ariz. 116, 118, 493 P.2d 498, 500 (1972), *superseded on other grounds as recognized by State v. Whitman*, 234 Ariz. 565, ¶ 13, 324 P.3d 851, 853 (2014), and we must examine the record as a whole to determine what the court actually said and intended. *See State v. Ovante*, 231 Ariz. 180, ¶ 38, 291 P.3d 974, 982 (2013); *State v. Jefferson*, 108 Ariz. 600, 601, 503 P.2d 942, 943 (1972). Despite the discrepancies within the court's pronouncement of sentence and the minute entry documenting it, the record here unambiguously shows that the court intended to make "all of the sentences in this case . . . concurrent to each other" in order to show some "mercy" to the defendant, while still ordering that these sentences be "consecutive to the other three cases," CR201200365, CR201200366, and CR201300166. The court's inclusion of the current cause number among those "other three cases" was a simple clerical mistake with no effect.

¶7 The sentences imposed in this case were thus concurrent with each other, lawful, and final upon pronouncement. *See* Ariz. R. Crim. P. 26.16(a); *State v. Thomas*, 142 Ariz. 201, 204, 688 P.2d 1093, 1096 (App. 1984). Once the sentences were imposed, they could not be modified. *See State v. House*, 169 Ariz. 572, 574, 821 P.2d 233, 235 (App. 1991). Although the trial court characterized its September 24 order as providing "clarification," the record demonstrates that the court was not simply clarifying the sentences previously imposed and correcting clerical mistakes in the judgment, as is permitted by Rule 24.4, Ariz. R. Crim. P. *See State v. Serrano*, 234 Ariz. 491, ¶ 6, 323 P.3d 774, 776 (App. 2014). Parts of the order certainly did this, but those portions are not challenged on appeal. In the relevant clause of that order, the court attempted to

substantively change many of sentences from concurrent to consecutive, as Davis maintains.

¶8 With respect to the current cause number, the record from the sentencing hearing suggests the trial court only considered—and rejected—the possibility of making the offenses committed in February consecutive to those committed in January. The court gave no indication it intended the sentences for the February offenses to be "consecutive[] with each other," as it later ordered. Furthermore, the court's post-sentencing order does not resolve the ambiguities and inconsistencies regarding the concurrent or consecutive nature of the sentences. The commencement dates on the minute entry still indicate that all the sentences are concurrent. The minute entry also continues to show that the two counts the court expressly ordered to be concurrent, on September 24, are "consecutive[] to the sentenc[es] in . . . CR201300167," the present cause number. In addition, the court's post-judgment order fails to specify whether the sentences for the class six felonies to be served "consecutively with each other" are to be served concurrently with the thirty-two-year sentence. These features of the record, in addition to those already noted, illustrate that, rather than clarifying the sentences actually imposed, the court's post-judgment order in fact attempted to modify those sentences in a manner that is not permitted by law. *See State v. Pyeatt*, 135 Ariz. 141, 144, 659 P.2d 1286, 1289 (App. 1982).

¶9 Except as provided in the Rules of Criminal Procedure, a trial court has no authority or "jurisdiction" to modify a sentence after its pronouncement, *State v. Superior Court*, 124 Ariz. 288, 289, 603 P.2d 915, 916 (1979); *State v. Falkner*, 112 Ariz. 372, 374, 542 P.2d 404, 406 (1975), especially when a defendant already has filed a notice of appeal. *State v. Ferguson*, 119 Ariz. 55, 58, 579 P.2d 559, 562 (1978). Rule 24.3, Ariz. R. Crim. P., allows the modification of a sentence only if it is unlawful or imposed in an unlawful manner, which was not the situation here. The rule does not "give trial courts a chance to second guess themselves." *House*, 169 Ariz. at 574, 821 P.2d at 235. Because our record clearly indicates the trial court intended to, and did, impose concurrent sentences for all counts in this case, *see id.*, we affirm the judgment and sentences

from September 5, as corrected in this decision, and strike the portion of the September 24 order purporting to make several counts in this case consecutive to each other.

Appellate Jurisdiction

¶10 The state contends, however, that this court lacks jurisdiction to consider the post-sentencing order because Davis filed no separate notice of appeal from it. Although the state primarily relies on *Serrano* to support this argument, its reliance is misplaced for two critical reasons.

¶11 In *Serrano*, we held that a defendant *may* appeal a post-sentencing order that exceeds a trial court's jurisdiction. 234 Ariz. 491, ¶ 15, 323 P.3d at 778. We never suggested or implied that a defendant *must* separately appeal such an order. In addition, *Serrano* concerned a situation where the defendant had failed to file a timely notice of appeal from a valid judgment and sentence, which is a prerequisite for appellate review, *id.* ¶ 5; instead, he had filed a notice of appeal only from the invalid post-sentencing order. *Id.* ¶ 16. Here, by contrast, a timely notice of appeal was filed from a valid judgment and sentence, which then conferred jurisdiction on this court to review and affirm them. *See* A.R.S. §§ 12-120.21(A)(1), 13-4033(A)(1), (4), 13-4036; *see also Ariz. Podiatry Ass'n v. Dir. of Ins.*, 101 Ariz. 544, 548-49, 422 P.2d 108, 112-13 (1966) (observing jurisdiction of court of appeals generally concurrent with that of supreme court); *State v. Rowland*, 12 Ariz. App. 437, 438 n.1, 471 P.2d 322, 323 n.1 (1970) (same).

¶12 On an appeal from a judgment of conviction, an appellate court has the authority to "make any order which is consistent with . . . justice and the rights of the state and the defendant." § 13-4036. Rule 31.17(b), Ariz. R. Crim. P., specifically authorizes this court to "affirm . . . the action of the lower court and issue any necessary and appropriate orders." It is an "anomalous and intolerable condition" for an order exceeding the superior court's jurisdiction to conflict with a judgment approved by an appellate court. *Sam v. State*, 33 Ariz. 421, 429, 265 P. 622, 625 (1928). Thus, when jurisdiction is properly vested in this court to review a valid judgment and sentence, we may affirm that judgment and

sentence while simultaneously recognizing the nullity of a post-judgment order in our record.

¶13 The state is correct that a void order issued after judgment may be appealed under § 13-4033(A)(3). Yet appeal is not the exclusive method for challenging such an order, *see State ex rel. Morrison v. Superior Court*, 82 Ariz. 237, 241, 311 P.2d 835, 838 (1957), and no rules of procedure prevent an appellate court from removing a void order that could cause confusion and complications were it left in place. *See, e.g.*, *State v. Jordan*, 120 Ariz. 97, 99, 584 P.2d 561, 563 (1978) (holding "[t]he usual time limits for appeal do not apply to an appeal from an act of a court which was beyond the court's jurisdiction"), *limited on other grounds by State v. Jones*, 124 Ariz. 24, 26, 601 P.2d 1060, 1062 (1979). Our general public policy is against piecemeal appeals. *Bilke v. State*, 206 Ariz. 462, ¶ 10, 80 P.3d 269, 271 (2003). Hence, a second appeal or notice thereof is unnecessary when a single one can achieve the same result. *See* Ariz. R. Crim. P. 1.2 (noting procedural rules designed for speed, simplicity, fairness, and "the elimination of unnecessary delay and expense").

Disposition

¶14 For the foregoing reasons, we affirm the sentences imposed at the September 5, 2013 sentencing hearing, which terms are "concurrent to each other" and "consecutive to the other three cases," CR201200365, CR201200366, and CR201300166. We correct the amended September 5 minute entry in the following manner, *see State v. Stevens*, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992):

> (1) On pages three and four, in the sentences reading "This sentence is to run **consecutively** to the sentenc[es] in CR201200365, CR201300166, CR201300167 and CR201200366," striking the number "CR201300167"; and
>
> (2) On pages six through ten, in the sentences reading "This sentence shall run consecutively with the sentences imposed in Defendant's CR201200365 and

> CR201200366," adding the number "CR201300166."

The clause in the September 24, 2013 order stating "Counts 11, 13, 15, 17, 19 and 21 of the Indictment are to run **CONSECUTIVELY** with each other" is void, as being in excess of the trial court's jurisdiction, and is hereby vacated and stricken from the record. The convictions and sentences are thus affirmed, as corrected.